

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2321

Cir. Ct. No. 2013CV140

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**DOROTHY D. MARTIN, DEROLD J. MARTIN AND
DEBORAH ANN NICKEL,**

PLAINTIFFS-APPELLANTS,

v.

RONALD MARTIN AND MARLA J. MARTIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Clark County:
NICHOLAS J. BRAZEAU, JR., Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Dorothy D. Martin, Derold J. Martin, and Deborah Ann Nickel appeal the circuit court’s order that awarded ownership of a cabin to Ronald Martin. They argue that the circuit court denied them the opportunity to fully litigate the issue of the cabin’s ownership. For the reasons that follow, we affirm.

Background

¶2 This case began as a dispute over the partition of land, with Dorothy and her children Derold and Deborah on one side, and Ronald and his wife Marla Martin on the other. When referring to the parties’ arguments or submissions, we refer to Dorothy and her children collectively as “Dorothy” and to Ronald and his wife collectively as “Ronald.”

¶3 The cabin at issue is situated on the partitioned land but is “movable.” For purposes here, there is no dispute that this movable cabin, when built, was initially owned by Dorothy and her husband, Ronald’s brother Donald. Donald passed away in 2011.

¶4 During the course of litigation, the circuit court issued a written order directing the parties to submit by a certain date offers of proof addressing ownership of the cabin. The order further stated that, after receiving the offers, the court would “hold a status conference ... to determine further proceedings in the matter.”

¶5 Ronald’s offer of proof included a copy of a handwritten agreement dated October 3, 1998. The agreement was notarized; appeared on its face to contain Donald’s signature; and provided that, upon Donald’s death, the cabin would become Ronald’s property.

¶6 Dorothy's offer of proof did not address the notarized agreement. Instead, Dorothy's offer stated that the cabin should be awarded to Dorothy and her children "due to the expenses used by [them] in building the cabin and the years of tax bills paid by [them]."

¶7 Based on the parties' offers of proof, the circuit court ruled that the cabin should be awarded to Ronald. The court stated:

Ronald submits a written agreement signed by ... Donald and notarized which gives ownership of the cabin ... to Ronald upon Donald's death. Donald's family replies that the cabin should be awarded to them because of money invested in it over time. Donald's family never addresses the written agreement in their offer of proof in any way, and the written agreement appears to speak for itself. Therefore, the moveable cabin is awarded to Ronald.

¶8 Dorothy moved for reconsideration. The court denied the motion. After the remainder of the litigation concluded, Dorothy appealed and, as noted, now challenges the court's award of the cabin to Ronald.

Discussion

¶9 Dorothy asserts that the circuit court erred both when the court ruled that the cabin was awarded to Ronald and when the court denied her reconsideration motion. Underlying both of these assertions is the same basic argument: Dorothy argues that the circuit court denied her the opportunity to fully litigate the issue of the cabin's ownership.

¶10 We choose to liberally construe the factual assertions in Dorothy's appellate briefing and circuit court submissions. In doing so, we understand Dorothy to be making the following factual claims regarding her lack of opportunity to litigate the cabin's ownership:

- The court’s offer-of-proof order required the parties to submit their offers simultaneously by the date given in the order.
- Until Ronald submitted the 1998 agreement in his offer of proof, Ronald had never before identified or disclosed the 1998 agreement to Dorothy.
- The existence of the agreement took Dorothy by surprise.
- Donald’s signature on the agreement appeared different than usual, providing reason to believe that the signature might be a fake.
- By the time Dorothy received a copy of the agreement, she had already submitted her offer of proof, and it was too late for her to submit a further response under the court’s offer-of-proof order.
- Dorothy did not immediately object to the 1998 agreement because she reasonably assumed, based on the offer-of-proof order, that the court would hold a status conference to determine the *nature* of further proceedings as to the cabin, not *whether* further proceedings were needed at all.
- Dorothy was blindsided when the court proceeded to issue a ruling on the cabin’s ownership instead of holding a status conference.
- If the court had held a status conference as ordered, Dorothy would have requested: the right to prepare a written response; the opportunity to conduct discovery; and a full hearing to challenge the 1998 agreement.

¶11 Thus, to summarize, we understand the main gist of Dorothy’s claim to be this: the 1998 agreement took her by surprise, and the circuit court’s actions denied her the opportunity to challenge the agreement.

¶12 Further, so far as we can tell, Dorothy argues that she could have challenged the 1998 agreement two ways. First, she could have challenged the agreement’s authenticity. Second, assuming Dorothy’s deceased husband Donald actually executed the agreement, Dorothy could have challenged the legality of the agreement in light of marital property law. Neither argument persuades us.

A. The 1998 Agreement's Authenticity

¶13 As to the 1998 agreement's authenticity, Ronald asserts that, subsequent to the circuit court's ruling on the cabin, the notary who notarized the agreement was deposed and confirmed the agreement's authenticity. More specifically, Ronald asserts that the notary testified that he remembered the agreement, that he remembered meeting Donald, and that he would have verified Donald's identity when witnessing Donald's signature. Therefore, Ronald argues, any actions by the circuit court that earlier prevented Dorothy from challenging the agreement's authenticity turned out to be harmless error. *See* WIS. STAT. § 805.18 (setting forth harmless error standards and stating that an error is harmless if the error does not affect the "substantial rights" of a party).¹

¶14 Dorothy does not dispute the notary's testimony or otherwise provide a reply to Ronald's harmless error argument. Nor does Dorothy identify in reply any issue as to the 1998 agreement's authenticity in light of the notary's deposition testimony. We take the absence of a reply on these topics as a concession. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. Accordingly, we agree with Ronald that any circuit court error preventing Dorothy from challenging the 1998 agreement's authenticity was harmless.

B. Dorothy's Marital Property Argument

¶15 Turning to Dorothy's marital property argument, Dorothy argues that the circuit court's actions prevented her from challenging the 1998 agreement

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

as invalid under marital property law requirements. Our reasons for rejecting this argument require a significant explanation. But, as we shall see, ultimately this argument is easily rejected based on Dorothy's failure to reply to Ronald's argument that the cabin is personal property that, unlike the underlying land, each spouse was free to unilaterally transfer under the marital property law.

¶16 Dorothy's marital property argument appears to be a purely legal argument based on undisputed facts. She does not claim that this argument required further discovery or factual development. Accordingly, rather than decide whether the circuit court erred by preventing Dorothy from making her argument before that court, we simply address the merits of her argument.

¶17 To repeat, there is no dispute that the cabin, when built, was owned by Dorothy and her husband Donald. For that matter, we perceive no dispute that the cabin, when built, was *marital* property. But, as we now explain, the fact that property is marital property does not automatically mean that both spouses must act together to transfer that property to someone else.

¶18 As a general rule, a spouse acting alone may transfer marital property that is held in that spouse's name alone or is not held in the name of either spouse. *See* WIS. STAT. § 766.51(1)(am); WIS. STAT. § 766.01(9)(a) and (11). Spouses must act together, however, if the property is held "in the names of both spouses other than in the alternative." *See* § 766.51(1)(am) and (2).

¶19 Dorothy's marital property argument appears to consist of the following chain of assertions:

- (1) Prior to Donald's death, the cabin was held "in the names of both spouses other than in the alternative." *See* WIS. STAT. § 766.51(2).

- (2) As a result of this form of holding, the cabin could be transferred to Ronald only if Dorothy and Donald acted together.
- (3) Dorothy and Donald did not act together because the 1998 agreement was not signed by Dorothy.
- (4) Therefore, any purported transfer to Ronald under the agreement was invalid.

¶20 For the reasons that follow, we conclude that Dorothy’s argument founders on her first assertion, namely, that the cabin was held “in the names of both [her and Donald] other than in the alternative.”

¶21 As explained in her briefing, Dorothy’s argument hinges on the proposition that the cabin, which is movable property, is titled the same as the underlying land. As Dorothy points out, the deed to the underlying *land* showed that the land was held in the names of Donald and Dorothy. If Dorothy’s repeated references to the “deed” are intended to refer to anything other than the land deed, Dorothy fails to make that clear. So far as we can tell, whenever Dorothy refers to the “deed,” she means only the land deed.

¶22 Ronald responds that the land deed does *not* control because the cabin was personal property: the cabin was movable, it was never affixed to the land, and it was taxed as personal property. Thus, according to Ronald, Dorothy would need something other than the land deed to show that the cabin was held in a way that restricted Donald from unilaterally transferring the cabin.

¶23 Dorothy provides no reply to Ronald’s personal property argument. We may, and do, take this failure to reply as a concession. *See United Coop.*, 304 Wis. 2d 750, ¶39. And, to repeat, Dorothy does not assert that her marital property argument required further discovery or factual development. Thus, we have no

reason to think that Dorothy believes that further discovery or factual development would have revealed additional information pertinent to the statutory standard that asks whether the cabin was “held in the names of both spouses other than in the alternative.” *See* WIS. STAT. § 766.51(2).

¶24 Moreover, even if we did not take Dorothy’s failure to reply as a concession, we would reject her marital property law argument as insufficiently developed. Based on the movable nature of the cabin and the intricacies of the marital property law, it does not suffice to simply assume that the land deed controls as to the cabin.

Conclusion

¶25 For the reasons above, we affirm the circuit court’s order awarding the cabin to Ronald.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

